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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-797

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

BENCHCRAFT, INC., DELIVERY, INC., and CAPITOL TRUCK LINES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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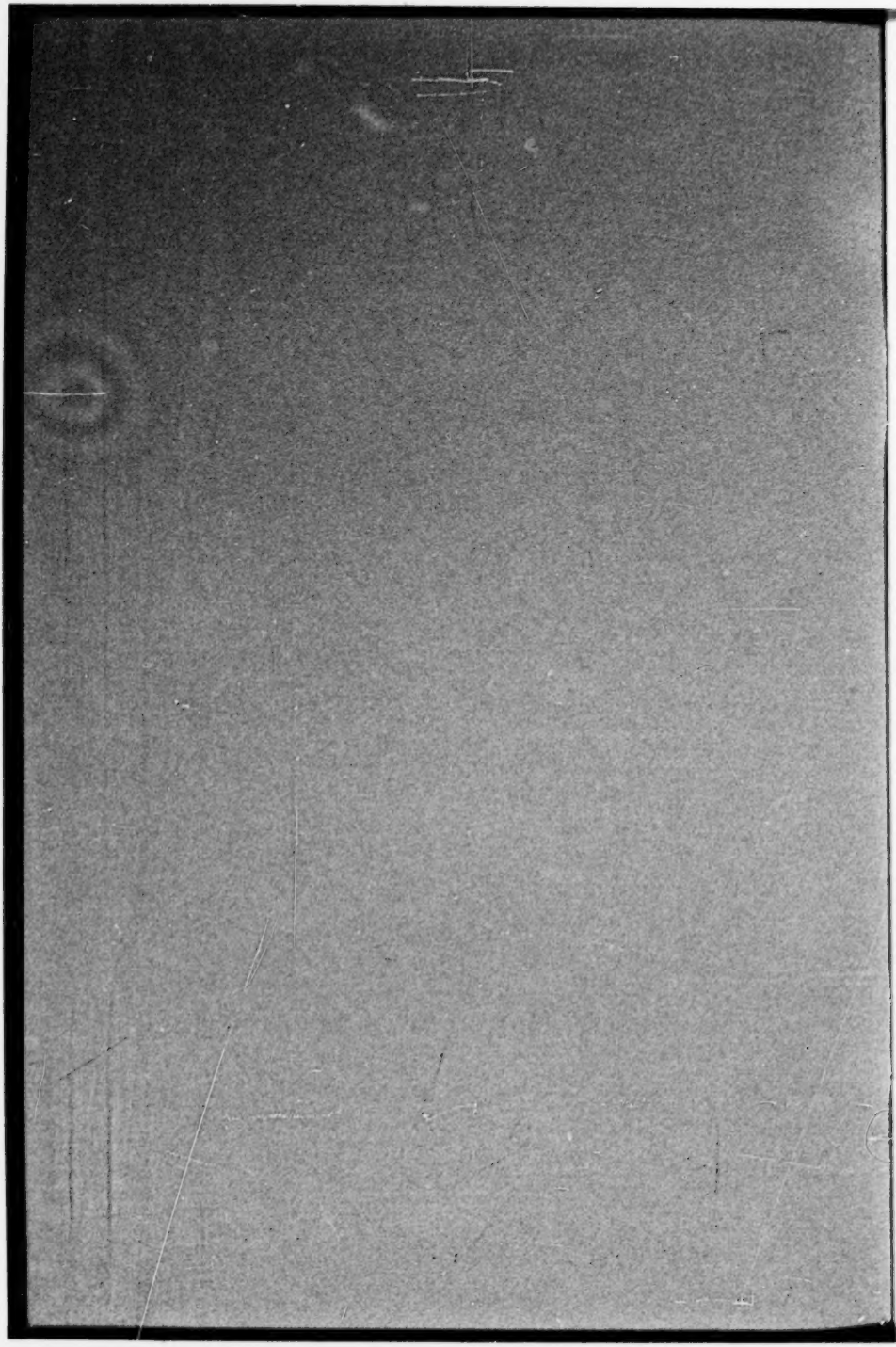

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STATEMENT OF THE CASE

Respondents are in substantial agreement with the statement of the case set forth in petitioner's brief, but believe the following additional facts are pertinent:

Trailer ELZZ was released and returned to its owner on August 15, 1970. Petitioner first sent statements to respondent Benchcraft for detention charges on the two trailers on February 20, 1973, at which time both trailers had been returned to petitioner or the owners of the trailers. Trailer NWZ was owned by General Transport, Inc. and leased to Northwestern Railroad. Petitioner's correspondence furnished in response to interrogatories indi-

cates that petitioner knew as early as November, 1972, that Northwestern, lessee of Trailer NWZ had paid the owner $3,600 for the depreciated value of the trailer when the trailer could not be found. Petitioner filed suit on August 8, 1973.

REASONS FOR DENYING THE WRIT

1. The decision of the United States District Court, as affirmed by the Court of Appeals, correctly applied the Act of Congress involved herein.

2. The section of the Act involved herein, 49 U.S.C. 16(3), is clear and unambiguous and courts, in applying this statute of limitations, have effected the intent of Congress.

3. This case does not present a question deserving of the attention of this Court. It is obvious from the statement of facts that few cases have arisen involving the issue here because most carriers will promptly bill for accrued demurrage charges and will seek return of their equipment in a time well within the three-year statutory period prescribed by Congress. To adopt petitioner's theory would reward the dilatory. If equipment is not returned in three years, carriers should sue for demurrage then accrued and for conversion.

4. There is no conflict between the decision of the Court of Appeals in this case and any other decision of a Court of Appeals concerned with 49 U.S.C. 16(3)(a) and (e). While the decision of the Court of Appeals may seem to be at odds with the decision of this Court in *United States* v. *Interstate Commerce Commission*, 246 U.S. 638, 38 S.Ct. 408, 62 L.Ed. 914 (1918), the present subsection (e) of 49 U.S.C. 16(3), was not added to the Act until

two years subsequent to *United States* v. *Interstate Commerce Commission, supra,* that is, in 1920. As petitioner correctly states, that decision reversed a Commission ruling that a shipper's cause of action accrued upon delivery of the property and held that the cause of action could not have accrued, nor the statute of limitations begun to run until a suit for the overpayment could have been instituted under the law as then written.

There can be little argument with the fact that, in general, a cause of action is deemed to accrue when a suit may first be legally instituted upon it. *United States* v. *Interstate Commerce Commission,* 246 U.S. at 644. The District Court acknowledged that such is the general rule but recognized that "Congress simply has discarded traditional judicial concepts" to effect the purpose of the Act. *Atchison, Topeka and Santa Fe Railway Company* v. *Benchcraft, Inc.,* 381 F.Supp. 603, 605 (W.D. Mo. 1974). Moreover, this Court in *United States* v. *Interstate Commerce Commission* expressly acknowledged that Congress could provide that the cause of action should accrue when the shipment was delivered by the carrier.

> [I]f Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression "from the time the cause of action accrues." (246 U.S. at 644).

The Court was inviting the Congress to change the Act if Congress intended for the cause of action to accrue at a time inconsistent with traditional judicial principles. Two years later, in 1920, Congress did just that by amending

the statute and adding subsection (3)(e), in simple, obvious and clear language for establishing a uniform period of application for the statute of limitation contained in the Act and adopting the theory which the I.C.C. had felt desirable in these cases.

Petitioner's notion that *United States* v. *Interstate Commerce Commission* correctly states the law despite the subsequent enactment of Section 16(3)(e) is illogical and incorrect. Thus, there is no conflict between the decision of the Court of Appeals in this case and *United States* v. *Interstate Commerce Commission* because the substantive statutory law under consideration in the two cases was entirely different.

Neither is the decision of the Court of Appeals, below, in conflict with the decisions of the Interstate Commerce Commission cited by petitioner. *Coal Corp. of America* v. *New York Central R.R. Co.*, 203 I.C.C. 755 (1934), provides no basis from which it can be said that it conflicts with the holding of the Eighth Circuit in this case. That decision appears to be concerned with demurrage charges accruing from the release of rail cars. The release date was not the return to the shipper but when a ship "reported ready for loading." The demurrage rules involved therein deal with docking delays of ships. Nowhere is there reference, either implicit or explicit, to Section 16(3). The only reference to accrual of the cause of action is the gratuitous statement that the cause of action accrued on November 28, 1929, the date on which the cars were released. The holding of the opinion does not involve any issue relating to the timeliness of the action. The opinion did not consider the issues involved in this matter.

Similarly, *Chazen* v. *Alabama G.S.R. Co.*, 296 I.C.C. 379 (1955), is not in point. Even under the Commission's own determination of the accrual of the cause of action,

the statute of limitations had run at the time the complaint was filed with the Commission. Thus, *Chazen* provides no authority for the resolution of the matter at issue in this case.

Arkansas Oak Flooring Co. v. *Louisiana and Arkansas Railway Company,* 166 F.2d 98 (5th Cir. 1948), cert. den. 534 U.S. 828, 66 S.Ct. 1338, 92 L.Ed. 1756 (1948), was recognized in the opinion of the District Court in *South Omaha Terminal Railway Company, Inc.* v. *Armour and Company, Inc.,* 373 F.Supp. 641 (D.Neb. 1974) is not applicable. In the *Arkansas* case the Court held that the applicable *rate* cannot be determined until the end of a given time period. The Nebraska District Court quoted extensively from *Baker* v. *Chamberlain Mfg. Corp.,* 356 F.Supp. 1314 (N.D. Ill. 1973), a case which is precisely in point and which was relied on by the District Judge in sustaining the motion for summary judgment herein which was affirmed by the Eighth Circuit.

In *Baker,* the plaintiff sought demurrage charges for cars delivered by plaintiff in April and May of 1969, the last shipment having been delivered on May 23, 1969, and the car released on May 27, 1969. Suit was filed on May 31, 1972. However, the parties to the suit were subject to a "Monthly Average Demurrage" tariff whereby credits earned on cars released prior to the expiration of free time during a month could be used on the last day of the month to offset debits incurred on cars released *after* the expiration of free time during the same month. The plaintiff had argued that the demurrage did not accrue until the last day of the month and therefore, the statute of limitations contained in 16(3)(a) and (e) could not begin to run until then because it was only then that the charges became collectible.

The District Court in *Baker* referred to the policy of the Interstate Commerce Act, as expressed by this Court in *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96 (1943), where this Court stated:

> . . . Section 16 expresses the specific policy of the Act with reference to the assertion of stale claims. On the section's face, this policy is one of uniformity and equality of treatment, as between carrier and shipper. (320 U.S. at 361).

The District Court held that where a "Monthly Average Demurrage Plan" is used the statute of limitations begins to run from the time of delivery.

Petitioner in this case does not even have an average monthly demurrage plan to rely upon to come within the applicable limitation period. Rather, petitioner contends that no charges could become due and collectible until the trailers were returned. This simply means that the consignee of the equipment can defeat recovery by never returning the carrier's equipment. The opportunities for discrimination in this theory are abundant and are clearly contrary to the policy of the Act recognized by this Court.

Tne Court in *Baker*, citing *Chicago & N.W.R. Co.* v. *Connor Lumber & Land Co.*, 212 F.2d 712 (7th Cir. 1954), determined that *Arkansas Oak* was distinguishable because it was a transit rate case with "a unique set of circumstances not readily analogous to demurrage cases." (356 F.Supp. at 1319). The District Court further stated that the rate in *Arkansas Oak* could not be determined until the end of the year within which the goods might be reshipped in an improved form. Under the average monthly demurrage plan, similar to the straight demurrage plan in issue here, the amount of charges was determinable at any

given point in time after the expiration of free time. The Court further stated:

> Plaintiff's major error lies in its misconstruing of the terms "accrue" and "come due" at least for the purposes of §16(3)(e). The statute is explicit that accrual under §16(3)(e) is not synonymous or mutually interchangeable with collectibility or dueness of the debt and that the point of delivery overrides any conventional motion of when an action judicially matures. *Indeed if the statute had meant to adhere to the general standards of allowing the statute of limitations to run from the point when the action could have been brought then §16(3)(e) would have been totally superfluous.* It is therefore clear that Congress anticipated the multitude of variations in periods of limitations that would result if conventional standards of triggering the period were used and promulgated §16(3)(a) and (e) in order to avoid such variation by creating a uniform time of accrual irrespective of when the action could have generally been brought. (356 F.Supp. at 1321) (Emphasis ours).

There should be little doubt but that demurrage charges are within the meaning of "in respect of a shipment of property" as stated in Section 16(3)(e) and the District Judge specifically so found. See *Pennsylvania R. Co.* v. *Carolina Portland Cement Co.*, 16 F.2d 760 (4th Cir. 1927) and *Chesapeake & O. Ry. Co.* v. *Wiener*, 58 N.W.2d 918 (Mich. 1953). *Chicago, R.I. & P. Ry. Co.* v. *Petroleum Refining Co.*, 39 F.2d 629 (E.D. Ky. 1930), is factually distinguishable because the case involved only the movement of empty tank cars. Therefore, the Court could reasonably find that there was no shipment of property so as to bring a claim for excess empty mileage within the ambit of Section 16(3)(a) and (e). *Missouri Pacific R.R. Co.* v.

Austin, 292 F.2d 415 (5th Cir. 1961), cited by petitioner, does not discuss nor do the facts of the case relate it to Section 16(3)(e). It is not relevant to a determination of the issues involved in this action.

The decision below does not deny a remedy to a carrier which is prompt in billing for demurrage and in seeking return of its equipment. The carrier can within the appropriate limitations period sue for demurrage and for conversion if the trailers are not returned. Petitioner did not sue for conversion in this case because the trailers were returned long before Santa Fe apparently discovered that demurrage charges were due or that the trailers had been returned. Here more than four years elapsed before petitioner sought to assert its rights. It cannot now be heard to complain.

The statutes of limitation applicable to shipments in interstate commerce are uniformly short. The policy of the Act is to prevent discrimination and to require prompt collection of charges. Petitioner's theory would reward the dilatory.

CONCLUSION

The decisions of courts under this statute find the statute clear and unambiguous. The decision below followed the ruling of all the cases that are in point. These cases have followed the clear language of the statute and the policy of Congress. Petitioner asserts no valid ground for doing otherwise. These are neither special nor important reasons for the Court to exercise its discretion in reviewing the decision of the Court of Appeals for the Eighth Circuit on Certiorari. As has been set forth above, the decision of the Court of Appeals does not conflict with the decision of another Court of Appeals on the same matter and the law

on this question is well settled and is consistent with the applicable decision of this Court. This case does not present a question deserving of the attention of this Court and the petition should be denied.

Respectfully submitted,

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